Office-Supreme Court, U.S.
FILED
JUL 23 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964.

No. 317

JANET MARIE CUDDY, Administratrix of the Estate of James R. Cuddy, Jr., Deceased,

Petitioner,

v.

WESTERN MARYLAND RAILWAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ELWOOD S. LEVY,
1000 Pennsylvania Lumbermens Bldg.,
211 South Broad Street,
Philadelphia, Pa. 19107,
Counsel for Petitioner.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTION AND STATUTE INVOLVED	2
STATEMENT	3
REASONS FOR ALLOWING THE WRIT	7
I. The Decision and Opinion Below Deprive the Surviving Widow and Her Four Minor Daughters of Their Right to Trial by Jury Guaranteed by the Seventh Amendment	7
A. Negligence	8
B. Employment	10
II. The Decision and Opinion of the Court Below Conflict in Principle With Applicable Decisions of This Court	12
III. The Decision and Opinion of the Court Below Set Bad Precedent	14
CONCLUSION	15
APPENDIX A:	
Amendment VII to the Constitution of the United States	17
Section I of the Federal Employers' Liability Act, 35 Stat. 65, as Amended, 45 U. S. C. § 51	17
APPENDIX B:	
Opinion of the United States Court of Appeals for the Third Circuit	18
Judgment of the United States Court of Appeals for the Third Circuit	18

TABLE OF CASES CITED.

	Page
Atlantic Coast Line Railroad Company v. Smalls, 216 F. 2d 842 (4th Cir., 1954)	12
Blair v. Baltimore & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490 (1945)	7
Carney v. Pittsburgh & Lake Erie Railroad Company, 316 F. 2d 277 (3rd Cir., 1963)	12
Casso v. Pennsylvania Railroad Company, 219 F. 2d 303 (3rd Cir., 1955)	12
Dice v. Akron C. & Y. R. Co., 342 U. S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952)	7
Gallick v. Baltimore and Ohio Railroad Company, 372 U. S. 108, 83 S. Ct. 659 (1963)	14
Healy v. Pennsylvania R. Co., 184 F. 2d 209 (3rd Cir., 1950)	12
Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73 (1947)	12
Lukon v. Pennsylvania R. Co., 131 F. 2d 327 (3rd Cir., 1942)	11
Martin v. Black, 221 F. 2d 567 (5th Cir., 1955)	12
Schulz v. Pennsylvania R. Co., 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668 (1956)	7
Thompson v. Eargle, 182 F. 2d 717 (4th Cir., 1950)	12
Virginia Ry. Co. v. Early, 130 F. 2d 548 (4th Cir., 1942)	11

STATUTES CITED.

	Page
Federal Employers' Liability Act, 35 Stat. 65, as amended, Section 1, 45 U. S. C. § 51	2
United States Constitution, Amendment VII	2,7
28 U. S. C., Section 1254(1)	2

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No.

JANET MARIE CUDDY, ADMINISTRATRIX OF THE ESTATE OF JAMES R. CUDDY, JR., DECEASED,

Petitioner,

v.

WESTERN MARYLAND RAILWAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 4, 1964.

CITATIONS TO OPINIONS BELOW.

The Memorandum Opinion of the District Court is not yet reported and is printed in Appellant's Appendix, pp. 117a-121a. The opinion of the Circuit Court of Appeals is not yet reported and is printed in Appendix B hereto, *infra*, p. 18.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 4, 1964. It is printed in Appendix B hereto, *infra*, p. 18. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Was the plaintiff deprived of her Constitutional right to trial by jury when, after a jury found from the evidence that plaintiff's decedent was employed under the Federal Employers' Liability Act at the time of the injury which caused his death and that his death resulted, in whole or in part, from the negligence of the defendant railroad, the trial judge overruled the jury's findings of fact and entered judgment n.o.v. for the defendant?

CONSTITUTION AND STATUTE INVOLVED.

The Constitutional provision involved is Amendment VII to the United States Constitution. It is printed in Appendix A hereto, *infra*, p. 17.

The statutory provision involved is Section 1 of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §51. It is printed in Appendix A hereto, *infra*, p. 17.

STATEMENT.

This is a death action under the Federal Employers' Liability Act. Federal jurisdiction is based on this Act.

On November 15, 1958, in Hagerstown, Md., plaintiff's decedent, James R. Cuddy, Jr., a locomotive engineer there employed by the defendant railroad, was shot and killed by James T. Haney, a fellow employee. He left surviving him his widow and four minor daughters. [The testimony of his widow and four daughters has been omitted from Appellant's Appendix because it relates only to damages, which are not in issue.]

Plaintiff's decedent had been called to work by the defendant for a shift commencing at 4:00 P. M. (12a, 16a). It was the practice for defendant's employees when called to work for a shift commencing at 4:00 P. M. to come to work 10 or 15 minutes early in order to be sure that they could cross the tracks and get to the caller's office on time (35a). The shooting took place between 3:40 or 3:45 and 4:00 P. M. (27a, 41a, 102a).

Immediately prior to the shooting, plaintiff's decedent was standing between a parking area located on defendant's premises and a path leading therefrom across the railroad tracks to defendant's caller's office, where defendant's employees must stop to have their time cards stamped when reporting to work (see photograph, Exhibit D-3, admitted in evidence; 14a; see also, 16a, 103a-104a, 106a-107a). At this point he was met by his father, a fellow employee, who had also been called by the defendant to report for work (16a). Not more than a minute or so after plaintiff's decedent had been joined by his father, Haney appeared on the path leading from defendant's caller's office (16a).

Haney, a fellow locomotive engineer, was working a shift for defendant that day which had begun at 8:00 A. M. and which was to terminate at 4:00 P. M. (42a). Haney

had cut off his engine for service at about 3:35 or 3:40 P. M., had gone to the caller's office (99a-100a), and then took the path across the railroad tracks toward where he had parked his car (102a-103a). Even though Haney had cut off his engine a few minutes early, he was still subject to the orders and instructions of the defendant until 4:00 P. M. (35a).

Two days prior thereto an altercation between Haney and plaintiff's decedent had occurred in defendant's caller's office (30a-31a, 33a-34a), at which time Haney had threatened to cut plaintiff's decedent with his knife (30a, 34a). Defendant had notice of this prior altercation through its Acting Caller, Spoonire (33a-34a), who was in charge of the office in a supervisory capacity for the defendant (77a-78a).

When Haney appeared in the path, he had his right hand concealed in his shirt pocket (18a, 26a). Plaintiff's decedent spoke to him and the argument continued. Plaintiff's decedent, obviously fearing that Haney was carrying a weapon to implement his pre-announced threat to do him bodily harm, called upon Haney to pull his hand out of his pocket and, upon his refusal to do so, slapped him (17a-18a, 26a). Haney then pulled his hand out of his shirt pocket, disclosing a loaded gun, and shot plaintiff's decedent (18a). The shot was fatal (9a, 67a).

Defendant's foreman, Samuel Bonebrake, testified that he had received information that defendant's employees carried guns on the job during hunting season. (Plaintiff's decedent was shot on November 15, during hunting season.) He had become foreman on January 1, 1958 (55a), and had received this information prior to the assumption of his duties as foreman (58a-59a).

Defendant's Acting Caller, Spoonire, had knowledge that defendant's employees carried guns on the job on different occasions during the hunting season and had actually seen them do so up until the time that plaintiff's decent was shot (36a).

Ira Burl Chambers, defendant's Division Superintendent at the time of the shooting, testified that while he was Trainmaster "employees got into the habit of carrying hunting guns" and that in 1953 "after the company became aware of what was going on, we passed this rule 25(h) prohibiting the carrying of firearms on engines" (76a).

Chambers testified that no inquiries were made of defendant's employees as to whether they carried guns or whether they had seen fellow employees carrying guns and no warning signs were posted in the caller's office or elsewhere and that the only step taken by the defendant was to place rule 25(h) in its timetable, hand out the timetable to its employees, and ask them to read and note the whole timetable (80a-81a).

Rule 25(h) can be found on page 26 of defendant's timetable #9 which was admitted in evidence as Exhibit D-7 (109a). The rule prohibits defendant's employees from carrying unauthorized firearms while they are on freight trains. It does not prohibit them from carrying loaded guns to and from work or while elsewhere on defendant's premises.

Foreman Bonebrake testified that, outside of the rule, he knew of no positive steps taken by him or any other railroad official relative to the carrying of guns by employees on the job (59a-60a).

Haney testified that he wasn't aware of the rule (69a).

Haney had carried the gun with which he shot plaintiff's decedent on his person to work that morning at 8:00 A. M. and had carried it with him all day (41a-42a). He had carried it with him to work on numerous prior occasions (43a). He had owned a gun previous to the gun with which he shot plaintiff's decedent and had carried that gun with him on the job on prior occasions (43a-45a). Many of defendant's employees had carried guns with them to work on various occasions during the hunting season up until the time when plaintiff's decedent was shot and killed (19a-20a, 36a, 65a).

The path along which plaintiff's decedent was shot ran from the area of defendant's caller's office to the right-angle dead-end corner where two small side streets, Elizabeth Street and Eutaw Street, met (Exhibits D-3 and D-6). Running north from this corner, between the east side of Elizabeth Street and defendant's railroad tracks, was a vacant lot. Exhibit D-6 shows, and it was testified, that this vacant lot was on the premises of the defendant railroad and was used by defendant's employees as a parking area (85a-86a, 34a-35a).

This path was the only one leading from defendant's parking area to defendant's caller's office (18a-19a). It was the most practical way to get from defendant's parking area to defendant's caller's office and it was the way normally used by defendant's employees for this purpose (113a), and had been customarily used by them for a long period of time (17a-18a, 35a, 92a). The path was located on railroad property (Exhibit D-6) and no one except railroad employees could use it without being guilty of trespassing (92a).

After a trial lasting two days, the jury returned a verdict in favor of the plaintiff in the amount of $40,000, allocating the amount of damages between the widow and her four daughters (4a). Judgment was entered on the verdict (4a). Thereafter, on December 6, 1963, the trial judge entered an order granting defendant's motion for judgment n.o.v. (122a). This order was affirmed by the United States Court of Appeals for the Third Circuit in a per curiam opinion on May 4, 1964 (Appendix B hereto, p. 18, *infra*).

REASONS FOR ALLOWING THE WRIT.

I. The Decision and Opinion Below Deprive the Surviving Widow and Her Four Minor Daughters of Their Right to Trial by Jury Guaranteed by the Seventh Amendment.

Petitioner, on behalf of the widow and daughters of plaintiff's decedent, invokes the stewardship of this Court in order to regain for them their Constitutionally protected right to a jury trial and verdict. As stated by this Court in *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, 524, 76 S. Ct. 608, 100 L. Ed. 668 (1956):

> "The jury trial 'is part and parcel of the remedy afforded railroad workers under the Employers Liability Act,' . . . The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'"

This Court has also held, in *Blair v. Baltimore & O. R. Co.*, 323 U. S. 600, 602, 65 S. Ct. 545, 89 L. Ed. 490 (1945):

> "To deprive railroad 'workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.' *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 354."

See also, *Dice v. Akron C. & Y. R. Co.*, 342 U. S. 359, 363, 72 S. Ct. 312, 96 L. Ed. 398 (1952).

Petitioner submits that the present case is not even close or doubtful, that the negligence of the defendant railroad is patent, and that the plaintiff's Constitutionally protected right to trial by jury is deserving of the consideration of this Court.

A. *Negligence.*

In this case the jury found that the defendant railroad was negligent and that this negligence contributed, in whole or in part, to the death of plaintiff's decedent.

The trial judge, however, overruled the jury and made his own finding of fact to the effect that there was no knowledge on the part of defendant's supervisory officers of the carrying of guns by its employees on freight trains in violation of defendant's work rule 25(h), and that the defendant, therefore, was not negligent (120a-121a). In answer thereto, petitioner respectfully submits that the trial judge's finding of fact is (1) in error, (2) a non sequitur, and (3) a usurpation of the function of the jury.

The issue was broader than merely whether the defendant had knowledge that its work rule 25(h) was being violated by its employees. The real issue was whether the defendant railroad, after receiving knowledge of the dangerous habits of its employees in carrying firearms on the job, failed to take such investigatory, precautionary or remedial steps as a jury could reasonably find it should have taken in the circumstances for the protection of its employees.

The jury was justified in finding that the defendant had constructive notice that its employees were carrying guns to work. As far back as 1953, the defendant "became aware" that its employees had gotten "into the habit of carrying hunting guns" with them to work (76a). It was then that the defendant enacted its work rule 25(h). It was within the province of the jury to find that the defendant should have conducted an investigation at least once between 1953 and November 15, 1958 (the day that plaintiff's decedent was shot), in order to determine whether in fact the rule was adequate and effective to terminate this dangerous habit. If the defendant had conducted even one such investigation, it would have apprised itself of the many instances where its employees carried loaded guns

with them to work on the job (19a-20a, 36a, 43a-45a and 65a). Yet, no investigation of any kind was ever made (59a-60a, 80a-81a).

It is clear that there were many steps that the defendant could and should have taken. For example, (1) it could have conducted an investigation to find out how widespread the dangerous practice was and the identity of the employees involved; (2) it could then have disciplined the employees involved; (3) it could have warned its employees that certain of their fellow employees were carrying loaded guns on the job; (4) it could have posted signs prohibiting such conduct; (5) it could have informed the employees' union and enlisted its aid to stamp out the practice; (6) it could have enacted an adequate prohibitory work rule and given it proper publicity and enforcement.

It was within the province of the jury to find that the failure of the defendant to take any or all of these precautions constituted negligence in the circumstances under the applicable principles of the F. E. L. A., and that such negligence played some part in causing the death of plaintiff's decedent.

Moreover, with regard to rule 25(h):

(a) This rule was inadequately drafted and too narrow in scope to provide sufficient protection in the circumstances. It prohibited the carrying of loaded firearms on the job by defendant's employees only while they were actually riding on one of defendant's freight trains. It did not prohibit them from carrying loaded guns to and from work or while otherwise on the premises of the defendant;

(b) The very fact that the defendant promulgated rule 25(h) in the first place shows that the defendant recognized the danger inherent in the carrying of loaded guns to work by its employees;

(c) Defendant imprudently failed to publicize the rule. Haney, defendant's employee who shot plaintiff's decedent, was not aware of the rule (69a).

There was other significant evidence of negligence. Orville Spoonire, whom defendant's Division Superintendent admitted was a supervisory employee of defendant while in charge of defendant's caller's office (77a-78a), witnessed an altercation between Haney and plaintiff's decedent wherein Haney threatened to cut plaintiff's decedent with a knife, which altercation took place in defendant's caller's office just two days prior to the day Haney shot plaintiff's decedent (33a-34a). Spoonire knew that the altercation was so serious that plaintiff's decedent immediately attempted, without success, to contact the road foreman (34a). He also knew that defendant's employees carried guns on the job on different occasions during the hunting season, and had actually seen them do so up until the time that plaintiff's decedent was shot (36a). Yet, neither Spoonire nor any other of defendant's officials, did anything with regard to scheduling of work or otherwise to preclude or diminish the likelihood that plaintiff's decedent and Haney would meet again two days later during the changeover of work shifts, nor did they take any steps to see that Haney would not be carrying a deadly weapon at that time *in order to carry out his pre-announced threat to do bodily harm to plaintiff's decedent.*

B. *Employment.*

The jury found that plaintiff's decedent was "employed" by the defendant at the time that he was killed and that he was entitled to the protection of the F. E. L. A. The trial judge, however, relying upon a Georgia appellate court's interpretation of the Georgia Workmen's Compensation Act, overruled the jury and made his own finding to the effect that plaintiff's decedent had stopped on his way to work for the purpose of talking to Haney; that he was the aggressor in the argument which resulted in his being shot; and that he thereby broke the continuity of his employment so as to forfeit the protection of the F. E. L. A. (119a). Petitioner submits that such

finding is both in error and a usurpation of the jury's function.

The meeting between Haney and plaintiff's decedent involved no more than a verbal exchange until plaintiff's decedent noticed that Haney's hand was grasping a weapon in his shirt pocket; it was only when Haney refused to remove his hand at the request of plaintiff's decedent that violence occurred. The precipitating cause of the violence was clearly the possession by Haney of the loaded gun while leaving the job and while still on railroad time and subject to the railroad's control (35a), a situation resulting, in whole or in part, from the negligence of the defendant. At least it was within the province of the jury so to find.

Moreover, as was so aptly stated in *Lukon v. Pennsylvania R. Co.*, 131 F. 2d 327, 329 (3rd Cir., 1942), per Chief Judge Biggs:

> "The Federal Employers' Liability Act was designed to be applied liberally for the protection of railroad and other employees."

The generally recognized criterion for determining when a railroad worker is "employed" for purposes of the F. E. L. A. is simply whether his position or conduct at the time of injury was reasonably *incidental* to his employment.

See, e.g., *Virginia Ry. Co. v. Early*, 130 F. 2d 548 (4th Cir., 1942). There the plaintiff railroad employee was due at work at 7:00 A. M., but arrived at least 20 minutes early. He then went to a lunch room for coffee, the lunch room being located about ¼ mile distant from the job location. He was injured while returning from the lunch room about 10 minutes before 7:00 A. M. The Court held that he was entitled to the protection of the F. E. L. A. as a matter of law.

Since, as in the *Early* case, a railroad employee who goes ¼ mile out of his way in order to purchase coffee

before commencing work is as a matter of law entitled to coverage under the F. E. L. A., it necessarily follows that an employee who pauses momentarily to talk to fellow employees while on the direct route to his job and standing directly between a parking lot owned and maintained by the defendant company for his use and a pathway across railroad tracks also owned and maintained by the company for his use, is also entitled to the coverage afforded by the F. E. L. A. as a matter of law. At the very least, any issue concerning deviation from employment was for the jury.

See, also, *Carney v. Pittsburgh & Lake Erie Railroad Company*, 316 F. 2d 277 (3rd Cir., 1963); *Martin v. Black*, 221 F. 2d 567 (5th Cir., 1955); *Casso v. Pennsylvania Railroad Company*, 219 F. 2d 303 (3rd Cir., 1955); *Atlantic Coast Line Railroad Company v. Smalls*, 216 F. 2d 842 (4th Cir., 1954); *Healy v. Pennsylvania R. Co.*, 184 F. 2d 209 (3rd Cir., 1950); *Thompson v. Eargle*, 182 F. 2d 717 (4th Cir., 1950).

II. The Decision and Opinion of the Court Below Conflict in Principle With Applicable Decisions of This Court.

The decision of the Court below conflicts in principle with this Court's decision in *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73 (1947). There the plaintiff was a female telegraph operator who worked alone at night in a one-room frame building in defendant's railroad yard in Memphis, Tennessee. One night when she opened the door in response to a knock a man entered and attacked her. The plaintiff alleged that the defendant was negligent in failing adequately to light the building and its surroundings or to patrol or guard it. The District Court, in dismissing the complaint, held that there was no causal connection between the injury and the defendant's failure to light or guard the premises and that the law does not permit recovery 'for the intentional or criminal acts' of either a fellow employee or an outsider. The Court of

Appeals affirmed. This Court, however, reversed the judgment, holding that liability under the F. E. L. A. was a jury question. This Court stated (pp. 461-462):

> "Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

In the instant case the plaintiff proved that the defendant was aware of a dangerous condition which created a likelihood of serious physical harm to its employees, i.e., the habit that some of its employees had fallen into of carrying loaded guns to work. Petitioner submits that a railroad has every bit as much duty to take reasonable steps to protect its employees from foreseeable harm at the hands of other of its employees as it does to protect them from harm at the hands of strangers.

It is a fact of nature that man inherently possesses aggressive traits and impulses which periodically manifest themselves. It is reasonably foreseeable, if not inevitable, that employees of a railroad should have occasional arguments and disputes and altercations. They occur not uncommonly among family and friends. How much more likely are they to occur among such diverse groups of persons as railroad employees, coming as they do from greatly differing backgrounds with varied and often incompatible temperaments and personalities. It is reasonably foreseeable that someone in a fit of temper might become violent and in the heat of the moment make use of the closest weapon which he might have available.

This is why the possession of loaded guns on their persons by railroad employees on the job creates such a deadly hazardous condition. The clear foreseeability of tragic occurrences resulting therefrom is also the reason that so many governmental entities have passed laws making it illegal to carry concealed guns on one's person, and prohibiting the sale or carrying of guns without a license, and restricting the use of guns to prescribed areas.

The decision and opinion of the Court below also conflict in principle with this Court's recent decision in *Gallick v. Baltimore and Ohio Railroad Company*, 372 U. S. 108, 83 S. Ct. 659 (1963). There the plaintiff was a railroad worker who suffered injury when bitten by an unidentified insect while he was temporarily working near a pool of stagnant water located on railroad property.

Petitioner submits that the duty of a railroad to provide its employees with a safe place to work extends to providing them a place as free from inhabitation by fellow employees with concealed loaded firearms on their persons as it is free from inhabitation by bugs from a stagnant pool. Indeed, the danger inherent in the former condition is much more pronounced than in the latter one.

III. The Decision and Opinion of the Court Below Set Bad Precedent.

Although technically the only persons injured by the decision of the Court below are the widow and four minor daughters of plaintiff's decedent, the decision and opinion set a noxious precedent for cases which may arise under the provisions of the F. E. L. A. in the future.

The decision and opinion of the court below stand for the legal principle that a railroad may absolve itself from all responsibility to its employees for the known dangerous conduct of its other employees by merely enacting a prohibitory work rule and placing it unobtrusively among many other rules in its work rules booklet, without making

any attempt to ascertain whether the rule is effective or is being complied with, and that this is so even though, as in this case, the work rule is inadequately worded, is not publicized, and is not specifically called to the employees' attention. Petitioner submits that this is not the law, should not be the law, and should not be represented as the law by an extant opinion of a Federal District Court affirmed and adopted by a Circuit Court of Appeals.

The decision and opinion of the court below also stand for the legal principle that the concept of "employment" under the F. E. L. A. is equivalent to the concept of scope of employment used by the Georgia state courts in interpreting the Georgia Workmen's Compensation Act (Appellant's Appendix, p. 119a). Petitioner submits that this also is not the law, should not be the law, and should not be represented as the law by an extant opinion of a Federal District Court affirmed and adopted by a Circuit Court of Appeals.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ELWOOD S. LEVY,
Counsel for Petitioner.

July 15, 1964.

APPENDIX A.

Amendment VII to the Constitution of the United States.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section I of the Federal Employers' Liability Act, 35 Stat. 65, as Amended, 45 U. S. C. § 51.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

APPENDIX B.

Opinion and Judgment of the United States Court of Appeals for the Third Circuit.

OPINION OF THE COURT.

(Filed May 4, 1964.)

Per Curiam:

On review of the record we find no error. The Order of the District Court of December 6, 1963 setting aside the jury's verdict in favor of the plaintiff and directing entry of judgment in favor of the defendant will be affirmed for the reasons so well stated by Judge Follmer in his Memorandum Opinion.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of December 6, 1963 of the said District Court in this case be, and the same is hereby affirmed, with costs.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 27 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 317

JANET MARIE CUDDY, ADMINISTRATRIX OF THE ESTATE OF JAMES R. CUDDY, JR., DECEASED,
Petitioner,

v.

WESTERN MARYLAND RAILWAY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM C. PURNELL,
300 St. Paul Place,
Baltimore, Md. 21202,
Counsel for Respondent.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

	PAGE
Questions Presented	1
Counter-Statement of the Case	2
Reasons for Denying the Writ	4
1. The lower court correctly ruled in granting the motion n.o.v. that the evidence was insufficient to support the jury's verdict	4
(a) The Petitioner's decedent had deviated from his employee relationship and was not under the protection of the F.E.L.A. at the time of the shooting	6
(b) The evidence of knowledge of the supervisory officers of the Respondent of the carrying of firearms in violation of Rule 25(h) was insufficient for submission to the jury	10
2. This case not only does not involve any factual issues, but also presents no matters of general importance sufficient to justify this Court in granting the Petition filed herein	12
Conclusion	13

Table of Citations

Copeland v. St. L., San Francisco Ry. Co., 291 Fed. 2d 119 (10th Cir., 1961)	7
Davis v. Green, 260 U.S. 349, 67 L. Ed. 299	7
Harris v. Pennsylvania Railroad Co., 361 U.S. 15, 4 L. Ed. 2d 1, 80 S. Ct. 22	12
Herdman v. Pennsylvania Railroad Co., 352 U.S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508 (1957)	5

PAGE

Inman v. Baltimore & Ohio Railroad Co., 361 U.S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959) 5, 12

Shea v. New York, New Haven and Hartford Railroad Co., 316 Fed. 2d 838 (1st Cir., 1963) 4

Sheaf v. Minn., St. Paul and S.S.M. R. Co., 162 Fed. 2d 110 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 317

JANET MARIE CUDDY, ADMINISTRATRIX OF THE ESTATE OF JAMES R. CUDDY, JR., DECEASED,

Petitioner,

v.

WESTERN MARYLAND RAILWAY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Was the District Court correct in the judicial appraisal of the sufficiency of the evidence to support the jury's verdict in finding that the evidence was insufficient for such purpose?

2. Does not the decision below turn upon its own facts and, hence, is of insufficient importance to justify this Honorable Court in granting certiorari?

COUNTER-STATEMENT OF THE CASE

All of the facts relating to the altercation between James R. Cuddy, Jr., and James T. Haney and of the subsequent shooting two days later were introduced by the Petitioner. Petitioner called as witnesses James R. Cuddy, Sr., James T. Haney, Samuel J. McCleary and Orville H. Spoonire. No witnesses were called by the Respondent in reference to the altercation and shooting.

The Petitioner's decedent, James R. Cuddy, Jr., was 41 years of age at the time of his death; James T. Haney, 68 (47a). Cuddy, Jr., was 5 feet 10 inches in height and weighed about 175 or 180 pounds (32a). As compared with Haney, he was a younger and a more stout man (32a).

Prior to the shooting on Saturday an incident had occurred at the Callers' Office on the previous Thursday. Mr. Haney at about quarter of four on that day had completed his tour of duty and was standing at the desk door of the Callers' Office making out his time card when Mr. Cuddy, Jr., came in and shoved Mr. Haney aside, saying, "Let a man get here registered" (47a). Mr. Cuddy, Jr., also grabbed Mr. Haney's shirt front and shook him, an act of aggrandizement performed by him on at least three prior occasions (51a). When asked whether this was done in a playful manner as a joke, Mr. Haney stated he did not know what Mr. Cuddy, Jr., called it, it certainly was not a joke to him. Cuddy, Jr., would shake the breath almost out of him, sometimes tearing buttons off his shirt (50a and 51a).

To continue the Thursday afternoon incident, witnesses McCleary and Spoonire verified Mr. Haney's statement that Cuddy, Jr., did shove him away from the registry door window, did grab ahold of his shirt front and shake him, and that Mr. Haney called Cuddy, Jr., foul names and

jabbed a pencil in his cheek as Cuddy held him (31a). Mr. Haney also threatened to cut him with his knife (34a).

Mr. Cuddy, Jr., then attempted to call Samuel K. Bonebrake, the Road Foreman of Engines and his superior officer, to complain of the stabbing with the pencil and threats made to him by Mr. Haney. He tried by telephone on two occasions and after that Mr. Haney left (34a). Mr. Cuddy, Jr., then went to Mr. Bonebrake's office and was informed that he was in Cumberland and would not return until the following day (96a). Mr. Cuddy, Jr., did not see Mr. Bonebrake or report the Thursday altercation to any official of the railroad company. Mr. Bonebrake knew nothing about this until after the shooting had occurred.

On Saturday Mr. Haney, after signing off-duty at between 3:40 and 3:45 walked across on the path from the Callers' Office to Elizabeth Street to get into his automobile to drive home. He was carrying his lunch box at the time in his right hand (54a, 107a). What happened to it after the shooting Haney did not know. He was never able to find it. On the other hand, Mr. Cuddy, Jr., when first seen standing on Elizabeth Street near this pathway by his father did not have his carryall bag with him. In answer to a question by the Court Mr. Cuddy, Sr., said he did not see it. However, this carryall was returned to Cuddy, Jr.'s home either that day or shortly thereafter. It was customary to carry such a bag to work (20a).

The altercation was started by Mr. Cuddy, Jr. As Mr. Haney walked up Mr. Cuddy, Sr., stated his son asked Mr. Haney if he cared to repeat the names that he had called him previously. Mr. Haney said, "Yes," whereupon Mr. Cuddy, Jr., slapped Mr. Haney with his left hand, knocking his glasses to the ground (22a). Mr. Haney said that Mr. Cuddy, Jr., did not slap him but hit him twice with judo

on the side of the face and on the neck. His glasses were broken (49a). He further stated that Cuddy, Jr.'s first remark to him was that he was going to beat Haney's old head off (49a).

> "Q. You said that you had prior trouble with Mr. Cuddy on a number of occasions. Was it always Mr. Cuddy's fault, never yours? A. I never agitate trouble, and I was too old a man to grab a younger man, a man forty pounds more than I, to shake him" (52a).

REASONS FOR DENYING THE WRIT

1. The lower court correctly ruled in granting the motion n.o.v. that the evidence was insufficient to support the jury's verdict.

Petitioner invokes the stewardship of this Court in order to regain for herself and children the constitutionally protected right to a jury trial and verdict, citing applicable cases of this Court in support of her position. The Respondent herein takes the position that before such constitutional right can be invoked the trial court must make a judicial appraisal as to the sufficiency of evidence to either support a jury verdict or, as in this case, to grant an n.o.v. In *Shea v. New York, New Haven and Hartford Railroad Company*, 316 Fed. 2d 838 (U.S.C.A. 1st Circuit, 1963), the Court said at page 840:

> "While it is true that in applying this statutory standard, the Supreme Court has allowed juries a liberal latitude in deciding whether particular facts make out employer negligence, e.g., *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511 (1957), nonetheless, other opinions of the Court clearly indicate that there must still be a judicial appraisal as to the sufficiency of evidence to support a jury verdict. See, e.g., *Inman v. Baltimore & Ohio R. Co.*, 361 U.S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959);

Herdman v. Pennsylvania R. Co., 352 U.S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508 (1957)."

Also, in *Inman v. Baltimore & Ohio Railroad Company*, 361 U.S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959), this Court said on page 140:

> "In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443 (1957), we laid down the rule that 'judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.' Id. at 506, 507. In measuring Ohio's disposition of the case here by the Rogers yardstick, we must affirm. The Act does not make the employer an insurer. Here petitioner had been working at Bettes Corners for seven years, performing these same duties under like circumstances and, for some three years, on this identical midnight shift. No accidents had occurred during that long period. In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury."

To the same effect is the case of *Herdman v. Pennsylvania Railroad Company*, 352 U.S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508 (1957).

It is the contention of the Respondent herein that the lower court correctly ruled:

(a) That the uncontradicted evidence introduced by the Petitioner in this case conclusively proved that Petitioner's decedent had deviated from his employee purpose in going to work and at the time of the shooting was not under the protection of the F.E.L.A.; and

(b) That there was no evidence in the case that the officials of the Respondent were aware that its employees were carrying firearms on freight trains contrary to Rule 25(h).

(a) *The Petitioner's decedent had deviated from his employee relationship and was not under the protection of the F. E. L. A. at the time of the shooting.*

The lower court in its Memorandum Opinion said (p. 119a):

> "Granted that Cuddy was on his way to work, he certainly was under no compulsion so far as his work was concerned to stop and await the arrival of Haney. The evidence is clear and undisputed that decedent had stopped on his way to work for the express purpose of talking to Haney. It is also clearly undisputed that in the altercation which followed the confrontation decedent was the aggressor. Cuddy's deviation was not for any reason related to his employment but for a purely personal one."

The Petitioner under subheading B, page 10 of the Petition, and in the Statement of Facts on page 4, undertakes to create the impression that James T. Haney was the aggressor and that an employee, in this case, James R. Cuddy, Jr., who pauses momentarily to talk to a fellow employee while on the direct route to his job was entitled to the coverage of the F.E.L.A. as a matter of law. Such is not the case. As the lower court said in the quotation above, Cuddy, Jr., was the aggressor. This is borne out in Respondent's Additional Statement of Facts wherein it is shown that Cuddy, Jr., was aged 42 and 40 pounds heavier than James T. Haney, who was 68 at the time. Mr. Haney, who was called by the Petitioner, testified that Mr. Cuddy was not only the aggressor in the altercation of the previous Thursday, but on several other occasions (51a). In answer to a

question whether he had had prior trouble with Mr. Cuddy, he said, "I never agitate trouble, and I was too old a man to grab a younger man, a man forty pounds more than I, to shake him" (52a).

On the day of the shooting James R. Cuddy, Sr., testifying for the Petitioner, stated that when Mr. Haney appeared his son asked him if he cared to repeat the names he had called him previously, and then struck him, knocking his glasses to the ground (22a). Mr. Haney, also produced as witness for the Petitioner, stated that Mr. Cuddy, Jr.'s, first remark to him was that he was going to beat his old head off (49a).

It is thus apparent that Petitioner's decedent in waiting for Mr. Haney before proceeding to his employment for the purpose of accosting him constituted a willful act wholly outside the scope of his employment, intended only to further his own interests and not those of his employer.

In the early case of *Davis v. Green*, 260 U.S. 349, 67 L. Ed. 299, where an employee shot and killed a fellow employee while on duty, Justice Holmes, writing the opinion for this Court, held that such assault constitutes a deviation sufficient to prevent recovery under the F.E.L.A. That case has never been overruled and has been followed in 1947 in the case of *Sheaf v. Minn., St. Paul and S.S.M. R. Co.*, 162 Fed. 2d 110, where one employee got down from an engine and without provocation assaulted another employee causing serious personal injuries, the court holding that the unprovoked attack upon the Plaintiff while they were both employed by the Defendant Railroad Company was in no way intended to further the business of the Company and was not within the scope of the employee's employment. See also the case of *Copeland v. St. L., San Francisco Ry. Co.*, 291 Fed. 2d 119 (CCA for the 10th Circuit, 1961), where the Plaintiff was in the process of hal-

ancing a tie on his shoulder when a fellow employee as a practical joke pushed upward on the back end of the tie causing Plaintiff to become unbalanced and to sustain injuries.

The decision of the 10th Circuit Court of Appeals is apt and fully covers the situation presented herein. In affirming the District Court the Circuit Court said on page 120:

> "It is a case submitted on undisputed evidence to the effect that the injury to the plaintiff was caused by a fellow servant *who was acting entirely upon his own impulse*, for his own amusement, *and for no purpose of or benefit to the defendant employer*". (Emphasis supplied.)

The Circuit Court further said on page 121:

> "The Courts have held that an employer is not liable under the F.E.L.A. for assaults by employees, which assaults are not committed *within the scope of the wrongdoer's employment in furtherance of the master's business*. (Emphasis supplied.) *Davis v. Green*, 260 U.S. 349, 43 S. Ct. 123, 67 L. Ed. 299; *Euresti v. Washington Terminal Co.*, 108 U.S. App. D.C. 81, 280 F. 2d 629; *Sheaf v. Minneapolis, St. P. & S. Sfe M. Ry. Co.*, 8 Cir., 162 F. 2d 110. . . . This rational has been applied generally in cases in which an employee was injured by the act of a fellow employee in sport or play, 35 Am. Jur., Master and Servant, Sec. 201 (1941). It has been applied in cases of this nature brought under F.E.L.A. which are collected in Annotations 33 A.L.R. 2d 1925, 1309 (1954). *Hoyt v. Thompson*, 7 Cir., 174 F. 2d 284, for example, involved injuries to an employee which were caused by two other employees who were wrestling or scuffling over a bar of soap. It was held that the employees, while so engaged, *were not acting in the furtherance of the railroad's business*. (Emphasis supplied.) Accord, *Blunk v. Atchinson, T. & S. F. Ry. Co.*, 97 Cal. App. 2d 229, 217 P. 2d 494; . . ."

The Court concluded on page 121:

> "It is urged that under the provisions of Section 1 of the F.E.L.A., the railroad is liable in all cases if either (1) the injury of the workman results 'in whole or in part from the negligence of the officers, agents or employees of such carrier' regardless of whether the fellow employee is acting within the scope of his employment, or (2) the instrumentality which inflicts the injury in use in the carrier's business, regardless of whether the fellow employee using it at the moment of injury is acting within the scope of his employment. While the trend of the Supreme Court decisions has been to require cases to be submitted to a jury on meager evidence, and these decisions in effect hold that if there is a scintilla of evidence of employer negligence a factual question is presented, there is no decision which holds that there can be recovery without some fault on the part of the railroad, or without proof of negligent acts of employees for which the railroad is responsible." . . .
>
> "We conclude, as did the trial court, that the acts of the fellow employee which caused plaintiff's injury *were wholly outside the scope of his employment, intended only to further his own interests, and not those of his employer, and were not chargeable to his employer.*" (Emphasis supplied.)

It is respectfully submitted that in the undisputed evidence in this case the trial court correctly ruled as a matter of law that at the time of the shooting Petitioner's decedent was not within the coverage of the F.E.L.A. On this point alone, the Petition for Certiorari in this case should be denied.

(b) *The evidence of knowledge of the supervisory officers of the Respondent of the carrying of firearms in violation of Rule 25(h) was insufficient for submission to the jury.*

The lower court in its decision on this point said (120a):

> "A careful reading of the testimony in this case leads to the inevitable conclusion that the plaintiff utterly failed to produce any evidence whatever of knowledge on the part of the defendant through its supervisory officers of the carrying of firearms by its employees on freight trains contrary to Rule 25(h). Under such circumstances there is no basis on which negligence could be imputed to this defendant in connection with Haney's possession of a concealed revolver on this occasion."

This is borne out by the evidence. Samuel Bonebrake, Road Foreman of Engines, called as witness by the Petitioner, stated that he had received no information that railroad employees carried guns on their persons while working for the railroad (57a). Ira B. Chambers, Eastern Superintendent for the Respondent, stated that Rule 25(h) was promulgated in 1953 after he had been informed of an incident in which an employee carried a gun while riding an engine on pusher service. Thereafter to the date of the shooting there had been no reports to him nor did he of his own knowledge know of any violations of this Rule (80a). His testimony also clearly indicated that before the railroad could take any disciplinary action for the violation of a Company Rule, an officer of the Company would either have to have personal knowledge of a violation or would have to be notified of the same. Then an investigation would be conducted, due notice thereof given the employee and union representative in order to obtain counsel and witnesses for a hearing. This entire procedure is governed by the union agreement (77a, 77b).

Petitioner for the first time in her Petition herein attempted to promote Orville Spoonire to a supervisory capacity. This employee knew that other employees carried guns on the job on different occasions during the hunting season and had actually seen them do so up until the time that Petitioner's decedent was shot (36a).

Mr. Spoonire was employed by the Respondent as a crew caller (34a). His job is to call the engine and train crews to go to work (38a). He is a supervisory employee only to the extent of looking after the office and conducting the calls to protect the seniority of the employees in their shifts in and out in connection with their employment (78a).

In answer to a specific question as to whether he at any time reported to any supervisory officers of the Company that employees of the Respondent were carrying guns during the hunting season, he said, "I didn't report it to anybody" (39a).

The Petitioner in her argument on this point on page 9 sets forth six steps that the Respondent could and should have taken to stamp out the dangerous practice of its employees carrying guns while on duty. It is submitted that in the absence of firsthand knowledge or of complaints having been presented to the supervisory officers of the Company of the practice of carrying guns, whether in violation of the Rule or otherwise, the Respondent could not be expected to conduct an investigation to determine whether this practice was followed. It could only take disciplinary action after its supervisory personnel had personal knowledge of a violation or had been notified of the same. As set forth above, the entire procedure is governed by the union agreement. In the absence of any actual knowledge or complaint, the Respondent was under no obligation to stab at windmills, so to speak. Petitioner attempted to create a smoke screen, but completely failed to introduce any evi-

dence of knowledge on the part of the Respondent of the carrying of firearms by employees while on duty. As Judge Follmer in his Memorandum Opinion in the District Court said:

> "There was no evidence that the company knew or had reason to know that firearms were on the company's trains in violation of the rule, and obviously the circumstances did not call for any drastic plan for frisking each employee as he entered upon his work."

In the light of this, the quotation from this Court's decision in the *Inman* case is apt (p. 140). "We believe that the evidence here was so thin that on a judicial appraisal the conclusion must be drawn that negligence on the part of the railroad could have played no part in Petitioner's" decedent's death.

2. This case not only does not involve any factual issues, but also presents no matters of general importance sufficient to justify this Court in granting the Petition filed herein.

The question of granting of Petitions for Certiorari in F.E.L.A. cases has been the subject of much study by this Court in recent years. A review of such cases for a ten year period to October 19, 1959, was made by Mr. Justice Douglas in a separate opinion in the case of *Harris v. Pennsylvania Railroad Company*, 361 U.S. 15, 4 L. Ed. 2d 1, 80 S. Ct. 22. Also, Mr. Justice Harlan, joined by Mr. Justice Whittaker, dissented in that case, in effect concurring with Mr. Justice Frankfurter on the ground that a case of this kind involving only factual issues and which are of no general importance have no legitimate demands upon the energies of the Court already taxed to the utmost. In the *Inman v. B&O* case, *supra*, Mr. Justice Frankfurter was of the opinion that the Petition for Writ of Certiorari should have been dismissed as improvidently granted.

In the case at bar there are in fact no factual issues, not only as to the deviation of Petitioner's decedent, but also as to proof of knowledge on the part of the supervisory officers of the Respondent that employees were carrying firearms while on locomotives contrary to Defendant's Rule 25(h) or while in the employ of the Respondent. To grant this Petition would in effect be in complete disregard of any judicial supervision over jury verdicts in such cases.

CONCLUSION

For the reasons set forth above the Respondent respectfully urges this Honorable Court to deny the Petition for Certiorari.

Respectfully submitted,

WILLIAM C. PURNELL,
Counsel for Respondent.